SBSK Plantations Sdn Bhd v Dynasty Rangers (M) Sdn Bhd

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–901 OF 2001
SU GEOK YIAM JC
19 NOVEMBER 2001

Companies and Corporations — *Winding up — Injunction to restrain petition — Application for — Whether judgment debt pending further appeal was disputed debt — Judgment debt not stayed pending appeal — Whether judgment debt was valid and enforceable — Right of petitioner to petition for winding up — Whether court had inherent jurisdiction to deprive petitioner of that right — Rules of the High Court 1980 O 92 r 4(2) — Companies Act 1965 ss 217(1)(B) & 218(2)(a)*

The plaintiff was the parent company of two subsidiary companies. The two subsidiary companies entered into a time charter. Subsequently, the time charter was assigned to the defendant. The plaintiff had given the defendant a corporate guarantee guaranteeing the 'fulfillment of all responsibilities and obligations' of the two subsidiary companies under the time charter. The two subsidiary companies defaulted on the hire payments and the defendant terminated the time charter. The disputes of the two subsidiary companies and the defendant were referred to arbitration. The defendant, then, instituted a suit against the plaintiff, as guarantor, for arrears of hire payable, interest and damages for breach of contract by the two subsidiary companies. The defendant also filed an application for summary judgment for a sum of RM12,099,825.17, which was the amount handed down by the arbitrators in favour of the defendant and S$166,439.89 being the cost of arbitration proceedings. The summary judgment was granted by the deputy registrar. The plaintiff, being dissatisfied with the order of the deputy registrar, filed a notice of appeal. The plaintiff did not apply immediately for a stay of execution of the summary judgment pending the appeal. On the same date that the summary judgment was granted, the defendant issued against the plaintiff a statutory notice premised on the summary judgment debt pursuant to s 218(2)(a) of the Companies Act 1965 ('the Act'). The plaintiff in this application applied for inter partes interlocutory injunction to restrain the defendant until the disposal of the plaintiff's appeal, from presenting a winding-up petition against the plaintiff, which was served on the plaintiff pursuant to s 218(2)(a) of the Act, on the ground of abuse of process as the plaintiff's appeal had not been disposed yet. In the meantime, the plaintiff being fearful that the defendant would present a winding-up petition immediately upon the expiration of the 21 day period as set out in the statutory notice thereby causing irreparable harm to its business and reputation, applied for an ex parte injunction to restrain the defendant from so doing. The ex parte injunction was granted.

Held, dismissing the application and setting aside the ex parte injunction:

(1) The summary judgment granted by the deputy registrar was a valid and enforceable judgment unless set aside or stayed pending appeal. The deputy registrar had considered the affidavit evidence of both parties before deciding that the defendant had established a prima facie claim against the plaintiff. Upon the defendant obtaining the judgment, the debt ceased to be a disputed debt. Thereafter, the question whether the debt was a bona fide disputed debt became a non-issue. This was so even though the plaintiff had filed an appeal against the judgment because the filing of an appeal did not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained (see p 339E–H).

(2) The defendant had rightfully proceeded to issue a statutory notice against the plaintiff pursuant to s 218(2)(a) of the Act. Upon the expiration of the 21 day period as set out in the statutory notice and the judgment remaining unpaid, the debt became 'due and payable' and the plaintiff was deemed to be unable to pay its debts. Consequently, the defendant succeeded in acquiring the status of 'creditor' for the purposes of winding-up proceedings pursuant to ss 217(1)(b) and 218(1)(e) of the Act (see pp 339I–340A).

(3) The defendant was entitled as of right to present a winding-up petition against the plaintiff. This right was a substantive right conferred upon the defendant by s 217(1)(b) of the Act, a substantive law, and neither O 92 r 4(2) of the Rules of the High Court 1980, a procedural law, nor the inherent jurisdiction of the court could deprive the defendant of that right or reduce the extent of that right as the question of abuse of process ought not to arise at all in such a context (see p 340A–B).

(4) As there was in existence a valid and enforceable judgment, which had not been stayed nor set aside on appeal, the court was satisfied that there was no bona fide serious question to be tried. Appeal could not be regarded as an abuse of the process of the court, the court was satisfied that there was no bona fide serious question to be tried (see p 340F–G); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 not followed.

[Bahasa Malaysia summary

Plaintif adalah syarikat induk kepada dua anak syarikat. Kedua-dua anak syarikat tersebut telah memasuki satu piagam masa. Berikutan itu, piagam masa tersebut telah diserahhak kepada defendan. Plaintif telah memberikan defendan satu jaminan korporat yang menjaminkan 'penunaian semua tanggungjawab dan kewajipan' kedua-dua anak syarikat tersebut di bawah piagam masa tersebut. Kedua-dua anak

syarikat tersebut telah gagal membuat pembayaran sewaan dan defendan telah menamatkan piagam masa tersebut. Pertikaian antara kedua-dua anak syarikat dan defendan telah dirujuk kepada timbangtara. Defendan, kemudian, telah memulakan satu guaman terhadap plaintif, sebagai penjamin, terhadap tunggakan sewa yang perlu dibayar, faedah dan ganti rugi kerana pelanggaran kontrak oleh kedua-dua anak syarikat tersebut. Defendan juga telah memfailkan satu permohonan penghakiman terus untuk satu jumlah RM12,099,825.17, yang merupakan jumlah yang diputuskan oleh penimbangtara yang menyebelahi defendan dan S$166,439.89 yang merupakan kos prosiding timbangtara. Penghakiman terus tersebut telah diberikan oleh timbalan pendaftar. Plaintif, kerana tidak puas hati dengan perintah timbalan pendaftar tersebut, telah memfailkan satu notis rayuan. Plaintif tidak memohon dengan segera untuk satu penggantungan pelaksanaan penghakiman terus tersebut sementara menunggu rayuannya. Pada tarikh yang sama penghakiman terus tersebut diberikan, defendan telah mengeluarkan terhadap plaintif satu notis statutori berdasarkan hutang pada penghakiman terus tersebut menurut s 218(2)(a) Akta Syarikat 1965 ('Akta tersebut'). Plaintif dalam permohonan ini telah memohon injunksi interlokutori inter partes untuk menyekat defendan sehingga selesai rayuan plaintif, daripada mengemukakan satu petisyen penggulungan terhadap plaintif, yang telah disampaikan ke atas plaintif menurut s 218(2)(a) Akta tersebut, atas alasan penyalahgunaan proses kerana rayuan plaintif belum lagi selesai. Sementara itu, plaintif yang berasa gusar dengan kemungkinan defendan mengemukakan satu petisyen penggulungan dengan serta-merta sejurus tamat tempoh 21 hari sebagai mana yang dinyatakan dalam notis statutori yang akan menyebabkan mudarat yang tidak boleh diperbaiki kepada perniagaan dan reputasinya, telah memohon satu injunksi ex parte untuk menyekat defendan daripada berbuat demikian. Injunksi ex parte tersebut telah dibenarkan.

Diputuskan, menolak permohonan tersebut dan mengetepikan injunksi ex parte tersebut:

(1) Penghakiman terus yang diberikan oleh timbalan pendaftar adalah satu penghakiman yang sah dan boleh berkuatkuasa kecuali diketepikan atau digantungkan sementara menunggu rayuan. Timbalan pendaftar telah mengambilkira keterangan afidavit kedua-dua pihak sebelum membuat keputusan bahawa defendan telah mengemukakan satu tuntutan prima facie terhadap plaintif. Setelah defendan mendapat penghakiman, hutang tersebut bukan lagi hutang yang dipertikaikan. Oleh itu, persoalan sama ada hutang tersebut merupakan hutang yang dipertikaikan secara bona fide tidak lagi menjadi satu persoalan. Ini adalah keadaannya meskipun plaintif telah memfailkan satu rayuan terhadap penghakiman tersebut kerana pemfailan satu rayuan tidak mempunyai kesan mengembalikan status

penghakiman hutang kepada status asalnya sebagai satu hutang yang dipertikaikan sebelum penghakiman diperolehi (lihat ms 339E–H).

(2) Defendan adalah betul dalam meneruskan pengeluaran satu notis statutori terhadap plaintif menurut s 218(2)(a) Akta tersebut. Setelah tamat tempoh 21 hari seperti mana yang dinyatakan dalam notis statutori tersebut dan penghakiman masih tidak berbayar, hutang tersebut menjadi 'terhutang dan perlu dibayar' dan plaintif dianggap tidak mampu membayar hutangnya. Berikutan itu, defendan berjaya mendapatkan status 'pemiutang' bagi tujuan prosiding penggulungan menurut ss 217(1)(b) dan 218(1)(e) Akta tersebut (lihta ms 339I–340A).

(3) Defendan mempunyai hak untuk mengemukakan satu petisyen penggulungan terhadap plaintif. Hak ini adalah hak substantif yang diberikan kepada defendan oleh s 217(1)(b) Akta tersebut, satu undang-undang substantif, dan maka, A 92 k 4(2) Kaedah-Kaedah Mahakmah Tinggi 1980, satu undang-undang prosedur, maupun bidang kuasa mahkamah yang sedia ada tidak boleh menidakkan defendan terhadap hak tersebut atau mengurangkan tahap hak tersebut kerana persoalan berhubung penyalahgunaan proses tidak sepatutnya timbul langsung dalam konteks begini (lihat ms 340A–B).

(4) Memandangkan terdapat satu penghakiman yang sah dan berkuatkuasa, yang tidak digantungkan maupun diketepikan atas rayuan, mahkamah berpuas hati bahawa tidak terdapat satu persoalan bona fide yang serius yang perlu dibicarakan. Rayuan tidak boleh dianggap sebagai satu penyalahgunaan proses mahkamah, mahkamah berpuas hati bahawa tidak terdapat satu persoalan bona fide yang serius yang perlu dibicarakan (lihat ms 340F–G); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 tidak diikut.]

Notes

For a case on injunction to restrain petition, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 883.

Cases referred to

Ban Hong Co Ltd, Re [1959] MLJ 100 (refd)
Bank Utama (M) Bhd v GKM Amal Bhd [2000] 5 MLJ 657 (refd)
Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533
Bruns v Colocotronis, The Vasso [1979] 2 Lloyd's Rep 412 (refd)
Cadiz Waterworks Co v Barnett (1874) LR 19 Eq 182 (refd)
Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)
Dynasty Rangers (M) Sdn Bhd v SBSK Plantations Sdn Bhd [2001] 7 CLJ 171 (refd)

Hong Leong Finance Bhd v Hon Hoi Weng & Ors [1987] 2 MLJ 377 (refd)
Isyoda (M) Sdn Bhd v Low Seong Tek (t/a Seong Trading Co) [2000] 6 MLJ 454 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Mechanised Construction Pte Ltd, Re [1989] 3 MLJ 9 (refd)
Nima Travel Sdn Bhd & Sun Soon Heng Coach Works Sdn Bhd, Re v Nima Travel Sdn Bhd [1986] 2 MLJ 374 (refd)
Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor [1989] 1 MLJ 190 (refd)
Public Bank Bhd v Muhibbah Meridian Sdn Bhd [2001] 1 MLJ 31 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip [1995] 3 MLJ 74 (refd)
Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram [1998] 1 MLJ 89 (refd)
Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd [1998] 6 MLJ 437 (not folld)
Young, Ex p; Re Kitchin (1881) 17 Ch D 668 (refd)

Legislation referred to

Companies Act 1965 ss 217(1)(b), 218(1)(e), (2)(a), 222
Rules of the High Court 1980 O 7 r 3(1), O 14, O 29 r 1(2A)(c), O 92 r 4(2)

G Rajasingam (*SS Soo* and *Mohd Izral Khairy* with him) (*Shearn Delamore & Co*) for the plaintiff.
KL Wong (*Nik Hussain & Partners*) for the defendant.

Su Geok Yiam JC: This is an application by the plaintiff vide a summons in chambers (encl 7) filed on 4 October 2001 for an inter partes interlocutory injunction to restrain the defendant until the disposal of the plaintiff's appeal to the judge in chambers in Ipoh High Court Civil Suit GS No 22–97–2000, from presenting a winding up petition against the plaintiff in connection with the defendant's statutory notice dated 3 September 2001, which was served on the plaintiff pursuant to s 218(2)(a) of the Companies Act 1965 ('the Act'), requiring the plaintiff to make payment within 21 days from the date of receipt of the notice of the sum of RM12,099,825.17, together with interest thereon, and a further sum of S$166,439.89 on the ground of abuse of process as the plaintiff's appeal to the judge in chambers has not been disposed of yet.

Facts and background

The facts and background have already been set out in detail in my earlier grounds of judgment in respect of an application by the defendant for a

A Mareva injunction in respect of Ipoh High Court Civil Suit GS No 22–97–2000 ('the said suit') (see *Dynasty Rangers (M) Sdn Bhd v SBSK Plantations Sdn Bhd* [2001] 7 CLJ 171).

Briefly, the plaintiff is the parent company of two subsidiary companies, namely, Perak Meat Industries Sdn Bhd ('PMI') and Export-Link Pte Ltd
B ('EPL'). The plaintiff holds 64% of the issued and paid up share capital of PMI and approximately 52% of the issued and paid up capital of EPL. On 14 February 1997, Perak Freight Services Sdn Bhd (PFS) entered into a time charter with PMI and EPL for a period of five years. Subsequently, PFS assigned the rights under the time charter to the defendant. The plaintiff had given to the defendant, a corporate guarantee guaranteeing the
C 'fulfillment of all responsibilities and obligations of PMI and EPL' under the time charter of a vessel belonging to the defendant. Upon the default by PMI and EPL on the hire payments, the defendant terminated the time charter and withdrew the vessel. The disputes between PMI and EPL and the defendant were referred to arbitration. The defendant instituted the said suit to recover from the plaintiff, as guarantor, arrears of hire payable,
D interest and damages for breach of contract by PMI and EPL. The defendant also filed an application vide a summons in chambers dated 29 August 2000 under O 14 of the Rules of the High Court 1980 ('the RHC') for summary judgment for a sum of RM12,099,825.17, which was the amount handed down by the arbitrators in their award in favour of the
E defendant against PMI and EPL comprising arrears of hire, damages for breach of contract and interest and also a sum of S$166,439.89 being the costs of the arbitration proceedings. The plaintiff was not a party to the arbitration proceedings.

In the interim, the defendant applied, unsuccessfully, for a Mareva injunction to freeze the plaintiff's assets up to a value of RM12.1m. This
F court decided that although the defendant was able to show a good arguable case, it had failed to satisfy the court that there was a real risk that the defendant would dissipate its assets.

Subsequent to that decision, the learned deputy registrar had, on 3 September 2001, given summary judgment to the defendant in the sum
G of RM12,099,825.17 and the sum of S$166,439.89 as prayed for.

The plaintiff, being dissatisfied with the order of the learned deputy registrar, filed a notice of appeal to the judge in chambers on a certificate of urgency. The appeal was fixed for hearing on 23 October 2001. The plaintiff did not apply immediately for a stay of execution of the summary
H judgment pending the appeal.

On the same date that the summary judgment was granted by the learned deputy registrar, the defendant issued against the plaintiff a statutory notice premised on the summary judgment debt pursuant to s 218(2)(a) of the Act.

I *Plaintiffs application for an ex parte injunction*

Fearful that the defendant would present a winding up petition immediately upon the expiration of the 21 day period as set out in the statutory notice,

thereby causing irreparable harm to its business and reputation, the plaintiff applied vide a summons in chambers (encl 3) filed on 17 September 2001 for an ex parte injunction on a certificate of urgency (encl 5) to restrain the defendant from so doing.

On 24 September 2001, after hearing submissions from En Mohd Izral, the learned counsel for the plaintiff, who was assisted by Ms SS Soo, I granted order in terms of encl 3. I also ordered that the plaintiff's application for an inter partes injunction be fixed for hearing on 9 October 2001.

In his submissions, En Mohd Izral, the learned plaintiff's counsel, had referred the court to the cases of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74; *Ex p Young; Re Kitchin* (1881) 17 Ch D 668; *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412; *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377 at p 379; *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 31 and *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437. Unfortunately, the cases of *Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor* [1989] 1 MLJ 190 and *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657 which did not favour the plaintiff were not cited to the court. I had granted the ex parte injunction on the following grounds: that it would be an abuse of process if the defendant is allowed to present a winding up petition founded on the judgment debt, which is a disputed debt in view of the pending appeal to the judge in chambers; there is, therefore, a bona fide serious question to be tried, namely, whether the decision of the learned deputy registrar granting summary judgment to the defendant is correct; the balance of convenience was in favour of the granting of the injunction as the plaintiff would suffer irreparable harm to its business and reputation; the plaintiff had given an undertaking in damages and finally that notice of encl 3 could not be given to the defendant because there was great urgency as the statutory notice would expire the next day. Encik Mohd Izral had submitted at length on the merits of the appeal in order to persuade the court that there was a disputed debt and a serious question to be tried.

Plaintiff's application for an inter partes injunction

On 9 October 2001, both parties appeared before the court for the hearing of encl 7. The plaintiff/applicant was represented by Mr G Rajasingam, who was assisted by En Mohd Izral and Ms SS Soo. Mr KL Wong represented the defendant/respondent. Mr G Rajasingam informed the court that he had been served with an affidavit in reply by the defendant on Friday, 5 October 2001, and the plaintiff required time to reply. He also informed the court that although an unsealed copy of encl 7 was served on the defendant on 4 October 2001, they had only extracted the sealed copy of encl 7 that morning which was yet to be served on the plaintiff. He did not give any reason why the sealed copy of encl 7 could not be extracted earlier and served on the defendant. He then sought a postponement of the hearing of encl 7 to 15 October 2001 in order to reply to the defendant's affidavit in

reply without explaining why the plaintiff could not have done so earlier. Upon strong objections from the defendant, and mindful that the ex parte injunction would lapse on 15 October 2001, the court refused the plaintiff's application for a postponement. The court heard submissions and the case was adjourned to 12 October 2001 for continued hearing.

On 12 October 2001, after hearing submissions from both sides, I dismissed encl 7 with costs in the cause and also set aside the ex parte injunction. I said I would give my reasons later. I do so now.

Setting aside of the ex parte injunction

Mr KL Wong has submitted that the ex parte injunction should be set aside on the following grounds:

(1) no notice of encl 3 was given to the plaintiff in breach of O 29 r 1(2A)(c) of the RHC despite prior notice having been given to the plaintiff's solicitors requiring service of a copy of the cause papers on them in the event the plaintiff applies to the court for appropriate relief; and

(2) there was non disclosure of material facts by the plaintiff, in particular, the plaintiff did not inform the court that an application for stay of execution of the summary judgment had been filed on or about 17 September 2001, and the plaintiff failed to exhibit in encl 3 all the cause papers filed in the said suit, especially the defendant's second application for a Mareva injunction.

In response, En Mohd Izral explained that in view of the urgency of the matter a copy of encl 3 could not be served on the defendant. He also submitted that there was no non disclosure of material facts because he had informed the court orally that the plaintiff had applied for a stay of execution of the summary judgment pending appeal to the judge in chambers.

In respect of the defendant's first ground, the court did not find the plaintiff's explanation a satisfactory nor a reasonable one because the statutory notice was served on the plaintiff on 3 September 2001, yet the plaintiff only applied on 17 September 2001, which was a good 14 days later, for the ex parte injunction. Further, encl 3 was fixed for hearing another seven days later, ie on 24 September 2001, which was also the last day of the statutory notice. The plaintiff could have easily served an unsealed copy of encl 3 on the defendant's solicitors anytime after 17 September 2001 and before 24 September 2001. However, this was not done. On this ground alone the ex parte injunction ought to be set aside.

In respect of the defendant's second ground, the court was satisfied that there was no non disclosure of material facts.

Dismissal of application for inter partes injunction

In respect of encl 7, the plaintiff has contended as follows:

(1) the defendant cannot at this stage present a winding up petition on the strength of the s 218(2)(a) notice dated 3 September 2000 as it is anchored on a judgment debt which is a bona fide disputed debt being the subject of a further appeal to the learned judge in the said suit; and

(2) until such time as the judgment debt is final and conclusive, the debt remains sub judice, and any presentation of a winding up petition with a view to winding up the plaintiff is an abuse of the process of the court.

In support of his two contentions, Mr G Rajasingam, the learned counsel for the plaintiff, relied on four cases, namely, *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd*; *Public Bank Bhd v Muhibbah Meridian Sdn Bhd*; *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533; *Isyoda (M) Sdn Bhd v Low Seong Tek (t/a Seong Trading Co)* [2000] 6 MLJ 454 and *Hong Leong Finance Bhd v Hon Hoi Weng & Ors*.

Mr KL Wong, the learned counsel for the defendant, has vigorously opposed the plaintiff's application. He submits that the two contentions raised by the respondent's learned counsel should be rejected, and encl 7 be dismissed with costs on the following grounds: first, the judgment debt cannot be said to be a disputed debt despite a pending appeal. Secondly, the court cannot go into the merits of the appeal at this stage. Thirdly, the plaintiff should apply to the learned deputy registrar to stay the summary judgment. Fourthly, in respect of this application the court should only consider the principles applicable to the granting of interlocutory, injunctions, in particular, whether there is a serious question to be tried, and as there is already a summary judgment, there is no serious question to be tried.

In support of his submissions, he has relied on the cases of *Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor*; *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 and *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657.

Cases cited by the plaintiff

I shall now consider the authorities relied on by the plaintiff. These authorities hold the view that as long as there is an appeal pending the judgment debt is a disputed debt and is not final and conclusive until the final outcome of the appeal culminates in the petitioner's favour.

In the first case, namely, *Solid Kitchen*'s case, the petitioner had obtained a summary judgment in the sessions court. The respondent appealed to the High Court against the judgment. The respondent also filed an application in the sessions court to stay execution of the judgment. In the interim, the petitioner, relying on the summary judgment, proceeded to issue a statutory notice pursuant to s 218 of the Act. Upon the failure of the respondent to pay the judgment sum within the 21 day period as set out in the notice, the petitioner immediately presented a petition to wind up the respondent on the ground that the debt had become due and payable. The respondent applied for all further proceedings in the petition to be stayed

pending the hearing and decision of the respondent's appeal pursuant to O 92 r 4 of the RHC and/or under the inherent jurisdiction of the court and/or alternatively under s 222 of the Act.

In granting a stay of the proceedings, Rekhraj J held that the debt was a disputed debt because of the pending appeal to the High Court. It was not a 'debt due and payable' and the petitioner was not a 'creditor' of the respondent until the disposal of the appeal in the petitioner's favour whereupon the judgment would become final and conclusive. He said as follows on p 439:

> Presentation of winding-up petitions are not a means of execution proceedings envisaged under O 45 of the Rules of the High Court 1980, but are independent proceedings taken under s 218(e) of the Companies Act 1965, by proving the establishment of a 'debt *due* and payable'; in that it must be due at the time of the demand; and made enforceable by threat of winding-up proceedings. But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub-judice, and any presentation of the petition in the circumstances is an abuse of the process of court, and the court will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s 222 of the said Act.

In respect of O 92 r 4 of the RHC and the inherent jurisdiction of the court to grant a stay, his Lordship relied on the authority of the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 where Edgar Joseph Jr FCJ (as he then was) had expressed his view that the function of the RHC is to regulate the machinery of ligitation. The RHC cannot confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties and that, therefore, the RHC cannot extend into the area of substantive law.

The facts and ratio recidendi of the second case, namely, the *Public Bank* case, are substantially similar to those in *Solid Kitchen*'s case, except that the summary judgment was granted by the senior assistant registrar of the High Court who had also dismissed the petitioner's application for a stay of execution pending appeal. At p 33B–D, Rekhraj J said as follows in respect of the summary judgment:

> It is not a final judgment, that has finally disposed off the rights of the parties. To be final, it must be said to be the last and conclusive judgment without any right; or subject of appeal. At most, such a judgment in the interim is either a contingent creditor, because his debt will only become due to him on an event upon the successful launching of the appeal, or a prospective creditor; in that the debt crystalizes upon the determination of the appeal in favour of the petitioner; and until then neither of the creditors, other than the judgment creditor has a right to present a petition, without first establishing the debt.

As for the third case, namely, *Bina Satu*'s case, there is a very important distinction between the facts in that case and the facts in the instant case, although in both cases there was an application for an equitable injunction

to restrain the presentation of a winding up petition. The important distinction is that, in that case, the statutory notice issued pursuant to s 218(2)(a) of the Act was not premised on a judgment debt. Further, the learned judge accepted the contention of the respondent that the claim by the petitioner was disputed by the respondent and that the petition was being 'presented ostensibly for a winding up order but in reality for another purpose such as to bring pressure to bear on the company'. Consequently, the learned judge granted the injunction sought for in exercise of the court's inherent jurisdiction to prevent an abuse of the process of the court. In doing so, VC George J relied on the authority of *Cadiz Waterworks Co v Barnett* (1874) LR 19 Eq 182, where it was held that the creditor of a solvent company whose debt is bona fide disputed will be restrained from presenting a petition for the winding up of the company.

At this juncture it is pertinent to note that the expression 'bona fide' was not used in the cases decided by Rekhraj J. The court notes that this expression is only used where the statutory notice is not anchored on a judgment debt (see *Re Ban Hong Co Ltd* [1959] MLJ 100; *Re Nima Travel Sdn Bhd & Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 2 MLJ 374 and *Re Mechanised Construction Pte Ltd* [1989] 3 MLJ 9).

In the fourth case, namely, the *Isyoda* case, there was again no judgment debt. Abdul Aziz J dismissed the originating summons for an injunction to restrain the defendant from presenting a winding up petition against the plaintiff on the ground that it did not comply with O 7 r 3(1) of the RHC, as it did not include sufficient particulars to identify the cause of action. Although the originating summons did not state why the defendant should be restrained from applying for a winding up of the plaintiff company, it was clear to his Lordship that the plaintiff's cause of action was an abuse of the process of the court. Nevertheless, his Lordship felt bound by the strict ruling in the Court of Appeal case of *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 that such an omission was fatal to the proceedings. Mr G Rajasingam, in seeking to distinguish that case on facts, submitted that in the instant case, the cause of action, namely, abuse of process of court, has been stated in the originating summons and that, therefore, the court should grant the plaintiff the injunctive relief claimed.

In my respectful view, as the issue whether a company can move the court for an injunction on the ground of abuse of process of court to restrain the presentation of a winding up petition based on a judgment debt did not arise in that case, the following views which the learned judge expressed at p 459B–C, to the effect that as long as the debt is bona fide disputed the status of the would be petitioner is not established, have to be considered in that context:

> It is of course true that if the demand is not settled within the three weeks, the creditor is entitled to present a winding up petition and that is because the company is then, according to s 218(2)(a) of the Act, deemed to be unable to pay its debt. But fundamental to the deeming is the question whether the would be petitioner is a creditor and so long as the debt is *bona fide* disputed, his status as a creditor is not established. That is why, even

A after the petition is presented, the advertisement of it or further proceedings on it may be restrained if it is shown that the debt is *bona fide* disputed. (Emphasis added.)

In order to demonstrate to the court that the judgment debt is *bona fide* disputed, Mr G Rajasingam has submitted that there are merits in the B plaintiff's appeal to the judge in chambers in the said suit. He has put forth the following five grounds. First, he says that estoppel applies because the defendant has retained a Malayan Banking Bhd ('MBB') guarantee which was given subsequent to the corporate guarantee, and which has not only effectively put an end to the liability of the defendant under the corporate guarantee, but also limited the liability of the defendant to 90 days hire C amounting to RM1,531,350 only. Secondly, the learned deputy registrar, in construing the legal effect of the corporate guarantee, erred when she held that the arbitration award was binding on the plaintiff when the plaintiff was not a party to the arbitration proceedings. Thirdly, the learned deputy registrar also erred in failing to appreciate that the liability of the defendant under the corporate guarantee, in any event, was limited to 90 days hire D which amounts to RM1,531,350 only. Fourthly, the learned deputy registrar erred in law when she failed to appreciate that there was no valid assignment of the time charter to the defendant resulting in the defendant having no locus standi to sue the plaintiff in the first place. Fifthly, the learned deputy registrar erred in resolving the conflicting evidence of the E plaintiff and the defendant as contained in their respective affidavits without the benefit of oral evidence.

In addition, he says that unless the defendant is so restrained, the plaintiff being a highly reputable company would suffer imminent and irreparable harm to its business and reputation because it would have lost the confidence of its trading and business associates. Further, he says that F the plaintiff's appeal, if successful, will be rendered nugatory and the plaintiff would have been deprived of the fruits of its success if the defendant is not so restrained. Lastly, he says that the defendant will not suffer prejudice in monetary terms as the judgment sum has provided for the payment of interest on the judgment sum until full settlement thereof.

G

Cases cited by the defendant

I shall next consider the authorities relied on by the defendant which hold a contrary view, namely, where the statutory notice is founded on a judgment debt, the court will not grant a discretionary injunction to restrain the H petitioner from presenting a winding up petition on the ground of abuse of process of court unless the judgment has been stayed or set aside.

In the first case, namely, *Patel*'s case, Wan Adnan Ismail J (now PCA) had set aside an ex parte injunction restraining the first defendant from presenting to the court, or any other court, a petition to, inter alia, wind up the plaintiff. In doing so, his Lordship rejected the plaintiff's contention that I the debt claimed which was based on a judgment, although it was a judgment in default of defence to the defendant's counterclaim, was a disputed debt, and that the defendant's action in serving on the plaintiff a

demand under s 218 of the Act based on the judgment debt was for the sole purpose of applying pressure on the plaintiff.

He said, as follows at p 281:

> In my view, the judgment had been regularly obtained. A judgment remains regular and enforceable until it is set aside by the court. Although the plaintiffs had filed an application to set aside the judgment, the judgment remains regular and enforceable until it is set aside. Until the judgment is set aside the claim by the first defendant based on the judgment cannot be regarded as a disputed debt. It is in fact an enforceable judgment debt.

He continued as follows in paras A–C:

> The first defendant is merely doing what it has the right to do having obtained a judgment against the plaintiffs which judgment has not been stayed.

In the second case, namely, *Aspatra*'s case, it was held by the Supreme Court that the learned registrar of the High Court should be considered notionally to be making the order of substituted service as if he were a deputy High Court judge, and unless set aside in proceedings instituted for the very purpose, subject to a very few rare exceptions, the order of substituted service of the High Court which is a superior court of competent jurisdiction must be obeyed by everyone. Although the facts of that case are different from those in the present case and the issue whether the presentation of a winding up petition based on a judgment debt can be restrained by an injunction did not arise at all, the decision suggests that a summary judgment granted by the learned deputy registrar of the High Court, albeit pending appeal, must be obeyed by everyone, unless stayed or set aside on appeal.

In the second case, namely, *Bank Utama*'s case, one of the two issues before the court was whether a judgment debt could form the basis of a winding up petition. In that case, the appellant had obtained a summary judgment against the respondent in respect of a debt. The respondent's appeal against the summary judgment had been dismissed by the learned High Court judge. The respondent appealed to the Court of Appeal. Subsequently, the appellant presented a winding up petition against the respondent based on the judgment debt.

The respondent raised an objection on the ground that as there was a pending appeal to the Court of Appeal, the judgment debt was a disputed debt. The respondent argued that, therefore, it could not form the basis of the winding up petition. Abdul Aziz J declined to follow the decision of Rekhraj J in *Solid Kitchen*'s case and rejected the objection. His Lordship held as follows at p 660:

> With respect, my understanding of what is meant by a disputed debt in the context of a winding up petition is that it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a *bona fide* dispute. A debt is not a disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The

A fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is *bona fide* disputed. The judgment has already established the contrary.

This decision is in line with the decision in *Patel*'s case and also his Lordship's earlier decision in *Isyoda* although both these cases were not B mentioned in his judgment. The reasons put forth by his Lordship succinctly explain the vital difference between the presentation of a winding up petition based on a judgment debt and the presentation of a winding up petition based on a bona fide disputed debt. A fortiori, I find Mr G Rajasingam's attempt to distinguish that case on the ground that in the instant case, the plaintiff's appeal against the summary judgment has yet to C be decided by the High Court to be a rather feeble one and without merits.

It is also my understanding that the following comments in the decision of VC George J in *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* at p 379:

> It has become the practice in the High Court, certainly in Kuala Lumpur, that the senior assistant registrars (many of whom are comparatively speaking D junior officers) are burdened with long lists and that out of necessity they dispose of their summary jurisdiction in so summary a manner that most of the judges who hear appeals from those decisions do not now require the senior assistant registrar to even write grounds of decision but hear the appeal by way of a rehearing of the original application, a rehearing in every sense of that word. This is not to derogate the judicial role played by the senior E assistant registrars. They act as an effective filter stopping some of the more blatantly unmeritorious applications from going through the sieve

were made in the context of an application for a stay of execution of a summary judgment granted by a senior assistant registrar of the High Court, and I do not think it was his Lordship's intention to extend his comments to the presentation of a winding up petition based on a summary F judgment which is pending appeal because different legal principles and considerations apply. In the instant case, the plaintiff should have acted promptly to obtain a stay of execution of the summary judgment.

The decision of the court

G In the instant case, the summary judgment granted by the learned deputy registrar is a valid and enforceable judgment unless set aside or stayed pending appeal. The learned deputy registrar had considered the affidavit evidence of both parties before deciding that the defendant had established a prima facie claim against the plaintiff. Upon the defendant obtaining the H judgment, the debt ceases to be a disputed debt. Thereafter, the question whether the debt is a bona fide disputed debt becomes a non-issue. This is so even though the plaintiff has filed an appeal against the judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained.

I The defendant here has rightfully proceeded to issue a statutory notice against the plaintiff pursuant to s 218(2)(a) of the Act. Upon the expiration of the 21 day period as set out in the statutory notice and the judgment debt

remaining unpaid, the debt becomes 'due and payable' and the plaintiff is deemed to be unable to pay its debts. Consequently, the defendant succeeds in acquiring the status of 'creditor' for the purposes of winding up proceedings pursuant to ss 217(1)(b) and 218(1)(e) of the Act.

Therefore, the defendant is entitled as of right to present a winding up petition against the plaintiff. This right is a substantive right conferred upon the defendant by s 217(1)(b) of the Act, a substantive law, and neither O 92 r 4(2) of the RHC, a procedural law, nor the inherent jurisdiction of the court can deprive the defendant of that right or reduce the extent of that right as the question of abuse of process ought not to arise at all in such a context.

As was said by Edgar Joseph Jr J in the *R Rama Chandran* case, O 92 r 4 of the RHC and the inherent powers of the court cannot 'take away or alter or diminish any existing jurisdiction or any existing rights ...'. In my view, the presentation of a winding up petition is an existing right under s 218(1)(e) of the Act. On this point, I would like to state here that I experienced some difficulty in reconciling what was said by Rekhraj J at p 440, in *Solid Kitchen*'s case and the obiter dicta in that case concerning the presentation of a winding up petition being regarded as an abuse of the process of court.

With the utmost respect, based on the reasons set out above, I declined to follow the decisions in the *Solid Kitchen* and the *Public Bank* cases.

Concerning the five grounds advanced by the plaintiff touching on the merits of the appeal, I am in complete agreement with Mr KL Wong, learned counsel for the plaintiff, that it would not be proper for me to consider them in these proceedings since there is already a regular and enforceable judgment.

I come now to the last issue, namely, whether there is a bona fide serious question to be tried so as to satisfy the first prerequisite for the granting of an inter partes injunction in accordance with the established legal principles governing the grant of such relief (see *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors*). As there is in existence a valid and enforceable judgment which has not been stayed nor set aside on appeal, the court is satisfied that there is no bona fide serious question to be tried.

Appeal, cannot be regarded as an abuse of the process of the court, the court is satisfied that there is no bona fide serious question to be tried.

In the premises, the court dismissed encl 7 and set aside the ex parte injunction with costs in the cause.

Application dismissed and ex parte injunction set aside.

Reported by Peter Ling